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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

SYMONS EMERGENCY SPECIALTIES, INC., Cross-complainant and Respondent, v. JENELLE LEA, Cross-defendant and Appellant.	E070493 (Super.Ct.No. CIVDS1619387) OPINION

APPEAL from the Superior Court of San Bernardino County. Gilbert G. Ochoa, Judge. Affirmed.

Chandler Law Firm, Robert C. Chandler, and Carla R. Kralovic for Cross-defendant and Appellant.

Garcia Reed & Ramirez, Raul B. Garcia and Jacoby R. Perez for Cross-complainant and Respondent.

Symons Emergency Specialties, Inc. (Symons) filed a cross-complaint against Jennelle Lea. More than six months after the cross-complaint had been served on her,

Lea filed a special motion to strike under Code of Civil Procedure section 425.16 (anti-SLAPP motion). That section requires that an anti-SLAPP motion be filed within 60 days after service of the complaint, unless the trial court, in its discretion, allows it to be filed later. Here, the trial court denied the motion as untimely.

As will be seen, the foregoing is somewhat reductive; the case took a lot of procedural twists and turns. Nevertheless, in this appeal, the key issue is the timeliness of the anti-SLAPP motion, and the facts above form the core of that issue.

We will hold that the trial court did not abuse its discretion by declining to consider the belated motion.

I

PROCEDURAL BACKGROUND

In November 2016, plaintiffs who are not parties to this appeal filed this action against Symons and other defendants.

Symons filed a cross-complaint against the plaintiffs, and also against Lea. On March 25, 2017, the cross-complaint was served on Lea. Lea did not file a timely response,[1] so on May 24, 2017, Symons took Lea's default.

On July 17, 2017, Symons filed an amended cross-complaint. Only the causes of action against the plaintiffs were amended — the causes of action against Lea were

[1] Lea has never claimed, at least on this record, that she was not served.

unchanged. Symons did not serve the amended cross-complaint on Lea. The trial court set Lea's default aside, apparently sua sponte.[2]

On October 4, 2017, Lea filed an anti-SLAPP motion, directed at the original cross-complaint.

Symons filed an opposition to the anti-SLAPP motion. It argued, among other things, that the motion was untimely, because it had been filed more than 60 days after the original cross-complaint had been served on Lea. (See Code Civ. Proc., § 425.16, subd. (f).) It also argued that it was not required to serve the amended cross-complaint on Lea, because she was not "affected" by the amendments. (See Code Civ. Proc., § 471.5.)

Lea filed a reply, arguing that her anti-SLAPP motion was timely because she had never been served with the amended cross-complaint.

Meanwhile, the original plaintiffs and defendants entered into a settlement. The complaint was dismissed with prejudice, and the cross-complaint was dismissed with prejudice as against the original plaintiffs. This left pending only Symons's cross-complaint against Lea.

Before the hearing on the anti-SLAPP motion, Symons moved for a continuance. It reiterated its contention that the anti-SLAPP motion was untimely, but it requested a continuance so that it could take "discovery . . . necessary for defending against the anti-SLAPP motion . . . ."

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[2] On June 23, 2017, Symons and Lea had entered into a stipulation to set aside her default. However, it was never filed.

On January 3, 2018, in lieu of granting a continuance, the trial court took the anti-SLAPP motion off calendar. It stated, "The anti-SLAPP can be refiled at the appropriate time." "I'm not ruling on the anti-SLAPP." "That needs to be refiled as a result of the ruling on the motion to continue." Lea's counsel asked, "So when can I refile the anti-SLAPP motion?" The trial court replied, "Whenever you want."[3]

On January 18, 2018, Lea refiled her anti-SLAPP motion.

Symons filed an opposition. It argued, once again, that the anti-SLAPP motion was untimely and that it was not required to serve the amended cross-complaint on Lea, because she was not "affected" by the amendments.[4]

And Lea replied, once again, that her anti-SLAPP motion was timely because she had never been served with the amended cross-complaint.

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[3] We are not sure why the trial court felt it needed to take the motion off calendar rather than simply continue it.

Possibly it was concerned about the fact that the pendency of an anti-SLAPP motion normally stays all discovery. (Code Civ. Proc., § 425.16, subd. (g).) Nevertheless, it had discretion to "order that specified discovery be conducted . . . ." (*Ibid.*) The trial court even stated that, if Lea refiled the anti-SLAPP motion, it would not stay the discovery that Symons was supposedly seeking.

Or possibly it assumed that Lea would need to revise her motion to incorporate the new discovery. This is not entirely consistent, however, with its statement that she could refile her motion "[w]henever [she] wanted."

[4] According to Lea, despite its request for a continuance, Symons never actually conducted any additional discovery. Certainly Symons's new opposition did not rely on any.

On April 10, 2018, the trial court denied the anti-SLAPP motion as untimely. It gave Lea 30 days to answer the amended cross-complaint. Lea's counsel protested that Lea still had not been served with the amended cross-complaint. The trial court, however, declined to change its ruling.

II

THE DENIAL OF THE ANTI-SLAPP MOTION AS UNTIMELY

An anti-SLAPP motion must be "filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." (Code Civ. Proc., § 425.16, subd. (f).)

Recently, in *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637, our Supreme Court held that: "'[A] defendant must file an anti-SLAPP motion within 60 days of service of the first complaint (or cross-complaint, as the case may be) that pleads a cause of action coming within section 425.16[, subdivision] (b)(1) unless the trial court, in its discretion and upon terms it deems proper, permits the motion to be filed at a later time [citation]. An amended complaint reopens the time to file an anti-SLAPP motion without court permission only if the amended complaint pleads new causes of action that could not have been the target of a prior anti-SLAPP motion, or adds new allegations that make previously pleaded causes of action subject to an anti-SLAPP motion.' [Citation.]" (*Id*. at p. 641; see also *id*., at p. 646.)[5]

[5] The Supreme Court's opinion in *Newport Harbor* was filed on March 22, 2018 — while Lea's refiled anti-SLAPP motion was pending. Throughout the proceedings, however, the parties had the benefit of the court of appeal's opinion in

Here, Lea did not file an anti-SLAPP motion within 60 days after the service on her of the original cross-complaint. The amended cross-complaint did not plead any new causes of action against her and did not add any new allegations to those causes of action. Accordingly, it did not restart Lea's time to file an anti-SLAPP motion.

Lea does not argue otherwise. She does argue, however, that the trial court told her she could refile her anti-SLAPP motion; she concludes that it did exercise its discretion, and that it essentially ruled that she could file it belatedly. Alternatively, she also argues that it was an abuse of discretion to refuse to let her file it belatedly.

We cannot construe the trial court's statement that Lea could refile her anti-SLAPP motion as an exercise of discretion. In opposition to the anti-SLAPP motion, Symons had argued that the trial court *should not* exercise its discretion to hear the motion. In her reply, Lea had argued that the trial court *should* exercise its discretion to hear it. At the hearing on Symons's motion for a continuance, the trial court stated, "I'm not ruling on the anti-SLAPP." This meant that, among other things, it was not deciding whether the motion was timely, or if not timely, whether it should hear it anyway. In addition, it said, "The anti-SLAPP can be refiled *at the appropriate time*." (Italics added.) Thus, again, it was not deciding when such an appropriate time might be. In context, it was merely saying that, if Lea wanted it to rule on her motion at all, she would have to refile it.

Newport Harbor, the holding of which was essentially identical to the Supreme Court's. (*Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2016) 6 Cal.App.5th 1207, review granted Mar. 22, 2017, S239777.)

Indeed, this is evidently how Lea herself understood it. Significantly, in her reply in connection with the refiled motion, she did *not* argue that the trial court had *already* exercised its discretion to accept her late filing. Rather, this argument has been newly minted for appeal.

We turn, then, to whether the trial court abused its discretion by refusing to entertain the motion belatedly.

"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) "A ruling that constitutes an abuse of discretion has been described as one that is 'so irrational or arbitrary that no reasonable person could agree with it.' [Citation.]" (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.)

"[T]he primary purpose of the anti-SLAPP statute [is] ensuring the *prompt* resolution of lawsuits that impinge on a defendant's free speech rights. [Citation.] In exercising its discretion in considering a party's request to file an anti-SLAPP motion *after* the 60-day period, a trial court must carefully consider whether allowing such a filing is consistent with this purpose." (*Platypus Wear, Inc. v. Goldberg* (2008) 166 Cal.App.4th 772, 776.)

Here, Lea's motion was extremely dilatory. She failed to file it within the initial 60 days — but that was not all. Between May 24, 2007, when her default was entered, and July 17, 2007, when the trial court set it aside, 54 days elapsed, during which she never sought to set the default aside herself. And between July 17, 2007 and October 4,

2017, when she filed the anti-SLAPP motion, another 79 days elapsed.[6] Ultimately, she filed the motion *193 days* after she was served with the cross-complaint. This was wholly inconsistent with the policy of promptness.

Significantly, this is even before the additional delay caused by Symons's motion for a continuance. There is no indication that the trial court held that delay against Lea. To the contrary, its ruling adopted Symons's argument that Lea's *first* motion was *already* untimely. We agree.

Moreover, Lea proffered no good cause for her delay. In her original reply, she did argue that, if she had filed her motion sooner, it would have interfered with the discovery then ongoing between the original plaintiffs and defendants. However, she did not claim that this was her actual, subjective motivation for the delay. Any such interference could have been easily prevented by stipulating to allow that discovery to continue. In any event, Lea did not reiterate this argument in her refiled motion. Thus, it was not before the trial court when it ruled.

Lea argues that there had been no "substantial litigation" in the interim; hence, there was no "gamesmanship" and no "abuse of the [a]nti-SLAPP statute . . . through delayed motions to strike."[7] Simply doing nothing, however, can constitute gamesmanship. At the risk of being trite, "Justice delayed is justice denied."

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[6] Lea's counsel admitted below that she had already decided to file an anti-SLAPP motion by July 28, 2017.

[7] Lea argues that *Newport Harbor* is distinguishable in this respect. Indeed, in her view, *Newport Harbor* stands for the proposition that, in the absence of either

If Lea is arguing that the trial court has no discretion to deny late filing in the absence of a showing of particularized prejudice to the opposing party, we disagree. The moving party has the burden to show why late filing should be allowed. When, as here, the delay has been egregious and the moving party fails to show good cause for it, it is not an abuse of discretion for the trial court to refuse to hear an untimely anti-SLAPP motion. (Cf. *Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 717 [“‘“ . . . a trial judge . . . must have discretion to deny a request for a continuance when there is no good cause for granting one . . . .” [Citation.]’ [Citation.]”].)

III

REFUSAL TO REQUIRE SERVICE OF THE AMENDED CROSS-COMPLAINT

Lea contends that the trial court erred by giving her 30 days to respond to the amended cross-complaint while refusing to require that it be served on her.

Somewhat unhelpfully, Symons does not respond to this contention. It asserts: “[W]hether Lea should have been served with the [amended cross-complaint] is only relevant for this appeal to the extent that it impacts [Lea’s] deadline to timely file an anti-SLAPP motion.” But not so. Lea is raising this as a separate claim of error.

“substantial litigation” or “gamesmanship,” late filing must be allowed. *Newport Harbor*, however, dealt exclusively with the calculation of the 60-day deadline. It did not reach the issue of whether the trial court in that case had abused its discretion by refusing to consider the motion after the deadline had run.

Code of Civil Procedure section 471.5, subdivision (a) states: "If the complaint is amended, . . . a copy of the . . . amended complaint must be served upon the defendants affected thereby."

Symons argued below that Lea was not "affected" by the amended complaint because the amendments did not change the causes of action against her.

Lea argues that this interpretation of the statute is too narrow — that she was "affected" by the amended complaint because it sought a judgment against her. She also argues, alternatively, that, when a complaint is amended after a defendant has defaulted, the amended complaint must be served on all parties, including the defaulting defendant.

"Even if not required, it is better practice to serve such amendments on all other parties (i.e., whether or not 'affected thereby')." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2019) ¶ 6:629, p. 6-180.) We need not decide, however, whether the failure to do so in this case was error, because Lea has not shown prejudice. She was served with the summons and the original complaint, and thereafter she made a general appearance; hence, there is no question that the trial court has personal jurisdiction over her. She has not claimed that she was, in fact, unable to answer. Because she knew the allegations against her were unchanged in the amended cross complaint, presumably she could. In any event, she has a copy of the amended cross-complaint now; it is in the appellate record. If she failed to file a timely answer, Symons might have trouble obtaining a second default against her — but that is Symons's problem, not Lea's.

Accordingly, even assuming the trial court erred, the error is not reversible. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 939.)

IV

DISPOSITION

The order appealed from is affirmed. In the interest of justice, each party shall bear its own costs on appeal.

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RAMIREZ
P. J.

We concur:

SLOUGH
J.

FIELDS
J.